APR 5
MICHAEL RODAK

In The

Supreme Court of the United States

October Term, 1973

No. 73-1496

ERNESTO SANTO GONZALEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO: The Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States.

Ernesto Santo Gonzalez, petitioner herein, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit entered March 7, 1973 affirming judgments of conviction of the United States District Court for the Eastern District of New York, Weinstein, D.J., rendered July 26, 1973, convicting the petitioner after a jury trial, of importing marijuana, possessing marijuana with the intent to distribute same, and conspiracy to import and possess marijuana in violation of 21 U.S.C. Sections 960(a)(1), 952(a), 841(a)(1), 963 and 846 and 18 U.S.C. Section 2,

and sentencing the petitioner to imprisonment for a term of five years plus five years special parole on each of three counts, each count to be served concurrently.

OPINION BELOW

The Court of Appeals affirmed the conviction without written opinion immediately upon conclusion of oral argument. The order of the Court of Appeals affirming the judgment of conviction is set forth as Appendix A. No motion was made for reargument or rehearing en banc. There was no opinion in the District Court.

JURISDICTION

The order of the Court of Appeals affirming the conviction was entered on March 7, 1973. No application has been made to extend the petitioner's time to file a petition for a writ of certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether this Court should resolve the conflict in circuits on the issue of whether in a case which presents a substantial question as to the identification of a defendant as a criminal actor, the trial judge should be required, sua sponte, to include language in the charge to the jury which serves to focus the attention of the jury on the question of identification.

2. Whether in the case at bar the failure of the trial judge to sua sponte charge the jury respecting the crucial identification issue deprived the defendant of a fair trial.

STATEMENT

The indictment named, in addition to the petitioner herein, one Jose Ancisar Pineda-Marin, Hugo Suarez, Moises Banguera, and Erasmus Flecher all of whom were jointly charged and jointly tried on each of the three counts of the indictment.

On March 20, 1973, customs agents in New York received a memorandum from a customs office in Galveston, Texas which indicated that the vessel Francisco Miguel, a ship of Colombian registry was a possible narcotics carrier (T44).[1] The vessel had docked in several ports in the United States prior to its arrival in Brooklyn, New York. On at least one occasion the vessel was searched prior to its arrival in New York. No contraband was discovered as a result of the search (T61). On March 25, 1973, at approximately 11:30 a.m. the Francisco Miguel arrived at the State Pier in Brooklyn, New York (T19). Approximately nine hours later, at 8:30 p.m. a surveillance was commenced under the direction of Special Agent John A. Grieco (T18, line 24; T19, line 5). Agent Grieco deployed approximately 15 other agents at various locations in and around the pier, so that each observation post was manned by two agents (T19-20), and each was connected to the others by radio (T177-176).

---

1. References preceded by the letter "T" are to the trial transcript.

At about 1:50 a.m., some 4 hours after the surveillance began, four men were observed[2] by Agent Graham (Agent Grieco's surveillance mate) aboard ship carrying heavy objects across a portion of the deck of the ship. Agent Graham so advised Agent Grieco, who then took up the binoculars which were being shared by the two men. Five minutes later, at 1:55 a.m., Agent Grieco received word by radio that one of the observation posts observed six men entering the pier area through a hole in a fence which led to the pier. The six were seen to proceed to an area behind a grain elevator building at which time they were no longer in sight (T351-352).

Agent Weinschenk was called by the Government and testified that a few moments before 2:00 a.m. he observed two men run from a point at or near the grain elevator building, Weinschenk's observation post, to the bow of the ship, at which point one of the two men lowered himself into the water while the other waited on the pier above (T327-328).

Agent Grieco then sent out the order to board the ship. Grieco arrived on board about 10 minutes after he lost sight of the men moving the bales (T214). Every

2. The observation post in which Agent Grieco and Agent Graham were stationed was located in the State Pier Building which overlooked the subject vessel, and was approximately 207 feet distant from the point at which the movement of the bales was claimed to have taken place (T474). It was, of course, dark, and it was raining throughout the night. The agents were looking through a closed rainswept window. Agent Grieco testified that he made his observation while standing atop a desk in order to look out upon the upper tier of windows since the lower tier was covered with rain (T25, 26).

person on the deck of the ship when the agents boarded was arrested, i.e., Defendants Marin, Flecha, Suarez and petitioner (T203, 216, 247). Indeed, Agent Cabrera, the man that placed petitioner under arrest had never seen petitioner before and had received no description of his appearance (T228-229, 371, 382). In his own words, he "wasn't looking for anyone in particular" when he boarded the ship (T367). He simply placed in custody anyone who happened to be on deck. Defendant Banguera was arrested on the pier and brought aboard the ship after being placed in custody.

As noted earlier, Agent Grieco observed four men carrying bales aboard ship. He subsequently identified three of the four to be Flecha, Marin and petitioner. Agent Grieco testified as to the length of time during which he observed the four men carrying bales. He stated initially that he observed them for no more than four minutes (T41). Thereafter, he stated that his period of observation made with the benefit of binoculars was less than one minute (T212). A further refinement of this observation occurred on cross examination when Agent Grieco admitted that he was able to see a facial view of all four men simultaneously for less than 10 — 20 seconds (T213). The immediate scene was illuminated only by an overhead light attached to the mast.

Grieco further testified that he was looking at four different faces momentarily, and in his own words, he stated that this was his problem (T244). He said that since he had seen defendant Marin earlier in the evening on several occasions he was not required to allocate much of the 10 — 20 seconds of facial view to defendant Marin. He

began then to concentrate on the other individuals, and testified that the most outstanding one there was the tall man that was not apprehended, and, whom he could not identify (T244). Grieco did not testify that he had seen petitioner at any time prior to the movement of the bales.

The inability of Grieco to identify the unapprehended man was pressed on cross examination by petitioner's trial counsel, who sought to show that the only reason that Grieco identified petitioner was because petitioner was in custody along with the men that Grieco was able to identify by virtue of his having seen them earlier in the evening.[3]

Finally, after the evasive response to the question noted in footnote 3, Agent Grieco admitted that he identified the three men accused of carrying the bales not

---

3. The following excerpt from the cross-examination of Agent Grieco appears at page 240 of the transcript at line 20 and continues to page 241 line 3:

> "A. I cannot identify a fourth man.
>
> Q. And that is because, is it not, that that man wasn't there when your agents arrested them? Isn't it fair to say that if they arrested four men in the vicinity of the deckhouse you would have identified the fourth man as the man you saw dragging the bales?
>
> Mr. Pattison: I object.
>
> A. We didn't arrest the fourth man."

by their faces, but rather by their clothing.[4] In this regard, Grieco had testified earlier as to the clothing worn by the men carrying the bales and that as to petitioner all he could see was that he was wearing a dark zipper type jacket and some sort of a knit hat (T177).

Although there were approximately 25—30 other seamen aboard ship at this time (T443) no effort was made to conduct a line-up of these men in order to enable Grieco to pick out the unapprehended bale carrier. Grieco admitted that he couldn't identify the man if he faced him (T242). There was no testimony as to how many men aboard that ship were wearing dark zipper jackets and knit hats.

An inspection of the bales was made after the arrest took place, and revealed the presence of marijuana. The innermost wrapping paper had Spanish words written upon it (T184). It should also be noted that the bales consisted of an exterior covering of oil soaked burlap, such that

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4. The following excerpt appears at page 241 line 16 to page 242 line 3:

> "Q. ... Now what would it take to line up these men and try to pick out this third man? A. Well I could identify the clothing.
>
> Q. That is the same with these men, isn't it? You didn't identify their faces? A. No, Sir.
>
> Q. Well what is it about the one man who was not apprehended whose face you couldn't see through the binoculars? A. I had him momentarily and all I could distinguish was a tall man with dark clothing."

contact with the bales left tell-tale oil stains on whatever object was used to make contact with the bales (T266, 291).

A visual inspection of the five arrested defendants resulted in a seizure from defendant Marin of oil-stained trousers. Analysis established that the oil stains on Marin's trousers were not similar to the oil on the burlap bales (T477, 478). No clothing was seized from petitioner Gonzalez nor was there any testimony as to his appearing, in any respect, soiled with oil.

The Proof Against Petitioner Gonzalez

The Government called six witnesses in support of its case. Their testimony, as it relates to petitioner Gonzalez, will be considered here in the order in which it was presented by the Government.

1) Agent John A. Grieco, agent in charge of the operation, testified that Gonzalez was one of the four persons whom he observed moving the bales aboard ship at approximately 1:50 a.m. on March 26, 1973.

2) Agent Robert Graham was assigned to the same observation post as Agent Grieco, and was the second witness for the Government.

He testified that he made the initial observation concerning the movement of the bales aboard ship. Graham testified that of the men he observed moving bales, he was able to identify only two, namely Marin and Flecha (T306-307). Moreover, he testified to having seen

Suarez, Marin and Flecha on several occasions earlier that evening but offered no testimony whatever about petitioner Gonzalez (T303-304).

3) Agent Eugene Weinschenk was next called by the Government. His testimony concerned observations of two men running onto the pier, one of whom lowered himself into the water while the other, defendant Banguera waited on the pier above. It was Agent Weinschenk who placed the defendant Banguera under arrest. He testified that at various times during the evening he saw the defendants Suarez and Flecha aboard ship (T331). At no time did he offer testimony concerning petitioner Gonzalez.

4) Agent Henry Maurer was next called by the Government. He had been assigned to a post on a tugboat and testified as to the observation he made of six men entering the pier through a hole in a fence, and proceeding to the area from which, moments later Banguera and the "swimmer" emerged and ran onto the pier (T349, 351). Maurer offered no testimony concerning petitioner.

5) Agent Victor Cabrera was next called by the Government. Cabrera is the man who placed petitioner under arrest. Prior to doing so he had never seen, nor been provided with a description of, Gonzalez. Cabrera arrested Gonzalez ostensibly because he observed him running on deck.[5] It should be noted that some ten minutes had

5. At trial it was established that Cabrera was in plain clothes as he boarded the ship, gun in hand and running. He slipped and his gun discharged accidentally. Once Gonzalez was informed as to the identity of Cabrera, he offered no resistance (T385). The Court refused to charge on consciousness of guilt inferrable from flight, upon the ground that under like circumstances any sensible man would do well to flee (T479).

elapsed from the time Agent Grieco saw bales being moved, to the point at which Cabrera saw Gonzalez aboard the deck (T565, line 23 to T567, line 8).

It was through Cabrera that the Government offered proof of a post-arrest statement by the petitioner. After the five defendants were arrested they were lined up on deck and Cabrera claims to have heard Gonzalez make a remark, in Spanish, the English translation of which is:

> "Why so much excitement? If we are caught we are caught" (T365).

Cabrera further testified that he is fluent in Spanish. He also admitted that the remark attributed to Gonzalez was a colloquialism and the first part of the statment could fairly be translated to mean "what's this all about" (T386).

6) The next and final Government witness was Manuel Restrepo, Captain of the Francisco Miguel. Restrepo testified that he never met, nor saw, Gonzalez before the agents exhibited the defendant to him (T434-435). He also testified that visitors were not permitted aboard ship in the evening (T404), and that men who break the rules are disciplined (T407). In essence, he stated that he ran a very tight ship and was hired for that purpose of asserting discipline aboard (T438). He also stated that no seamen would want the Captain to find friends aboard ship (T439).

Thus the entire case against Gonzalez rests upon the testimony of Agent Grieco who identified defendant under the circumstances described above as one of the men moving the bales, and the statement attributed to defendant by Agent Cabrera.

REASONS FOR GRANTING THE WRIT

I.

This Court should resolve the conflict in circuits on the issue of whether in a case which presents a substantial question respecting the identification of an accused as a criminal actor, the trial judge should be required to charge sua sponte on the issue of identification such that the attention of the jury is focused upon the crucial issue of the case.

As to Petitioner Gonzalez the trial evidence presented by the Government, created as to him, a substantial question as to the sufficiency of the proof of his identity as a criminal actor. Consequently, the jury was required to consider and resolve this most fundamental of all issues.

Petitioner Gonzalez did not request the Court to charge on identification, and no charge on the subject was given. No exception was taken from the instructions given the jury by the trial judge.

In the instant case a substantial possibility exists that a misidentification occurred at trial. The circumstances surrounding Agent Grieco's observations are, when viewed in their totality, uncommonly bereft of the normal indicia of reliability.

The external conditions consisted of a nighttime viewing with illumination provided solely by an overhead light affixed to a mast at a height vastly greater than a normal street light. To further hamper the ability of the agents to observe, there was a steady downpour of rain

which made the window through which the agents were looking so unsatisfactory a vantage point that it was necessary for the agent to stand atop a desk in order to peer out of the upper tier of windows which somehow was less rainswept than those below.

In addition the distance was approximately 207 feet from the window to the point at which the four men were carrying bales. The agents were using binoculars as well they must have. But even with the aid of binoculars one of the agents, Graham, testified that he was able to identify only those defendants whom he had previously seen during the course of the evening, and in any event the petitioner was not identifiable to him. The observations by Grieco as to the four men were made in the identical circumstances as were those of Graham.

It is undeniably true that the testimony of one witness may suffice in order to sustain a conviction in the type of case here on appeal. *VII Wigmore on Evidence*, Section 2034. This proposition should not foreclose inquiry, however, where substantial doubt exists as to the sufficiency and reliability of the identification evidence adduced. Where only one witness' identification is offered, and may suffice to convict, it is particularly relevant to consider the failure of another witness, whose opportunity to observe, prior acquaintance with the subject, training, etc. is identical to the witness who makes the identification. *Sobel, Eye-witness Identification*, p. 136.

As to the period of time during which Grieco was able to see the faces of the four men, by his own testimony it was a period of less than ten to twenty seconds during

which all four simultaneously turned around. Add to these circumstances the fact that when boarding the ship some ten minutes later, Grieco saw petitioner in custody, standing with three other men whom he had been observing over the course of a four hour surveillance and whose "guilty" activities are by now well known to him, and the suggestiveness of this show-up [6] is readily apparent.

Further, the failure of Agent Grieco to conduct an immediate line-up of the other 25 — 30 seamen below deck attests to his total inability to make any type of identification of the fourth, unapprehended person, whose posture of identifiability was no different than that of the petitioner.

By reason of the circumstances described above, the question of whether the petitioner was the victim of a misidentification is a substantial one. Due to the absence of a charge which served to focus the attention of the jury on the eyewitness identification issue it cannot fairly be said that the question was properly left to the jury's consideration. In the instant case, when one considers that the jury was offered nothing but the bare assertion that "this is the man" and a partial description of the clothing, (dark jacket, knit cap) the question must be raised as to whether the jury was in possession of sufficient information upon which to make an informed judgment as

6. It is not here argued that the show-up was impermissibly or unnecessarily suggestive. It is submitted that the confrontation was suggestive, albeit necessary, and that the suggestiveness is a factor to be considered in the totality of circumstances surrounding the reliability and trustworthiness of the identification by Agent Grieco.

to the establishment of guilt beyond a reasonable doubt. Little comfort can be found in the jury's verdict since at no time during the charge by the Court was the jury's attention focused upon the key issue of this case as to petitioner, namely the issue of identification.

A distinction should be drawn between charging as to the *dangers* of eyewitness identification, as was requested in *United States v. Fernandez*, 456 F.2d 638 (2 Cir. 1972) and *United States v. Evans*, slip op., p. 5201 at 5217 (2 Cir. 1973) and charging on identification simply to frame the issue and focus the attention of the jury upon its significance, as in *Jones v. United States*, 124 U.S. App. D.C. 83, 361 F.2d 537, 542 (D.C. Cir. 1966), and *United States v. Levi*, 405 F.2d 380 at 382, 383 (4 Cir. 1968).

It is not here argued that it is plain error for the trial judge to fail, upon request or otherwise, to charge the dangers of eyewitness identification in all identification cases. It is argued that in a case which presents so crucial an identification question as the one at bar, plain error can, and does occur where the jury is not instructed by the trial judge that an identification issue exists and must be resolved by the jury before reaching the question of whether the alleged crimes were committed. Optimally, the jury should be given some guidance with respect to dealing with such an issue, and at that juncture, depending upon the circumstances of the case, a cautionary charge may be necessary, but at the least the jury's attention must be focused on the issue if they are to be enabled to properly discharge their duty.

In order for a lay jury to scrutinize eyewitness identification testimony "in an especially carefully way", *United States v. Rabb*, 453 F.2d 1012 (Cir. 3, 1971), they

must first be instructed to do so. It is by now apparent that juries do not understand intuitively how to deal with the dangers of eyewitness identification.

In other Circuits, there has been a perceptible evolution in the cases treating the question posed by this appeal.

In 1942, the Court of Appeals for the District of Columbia decided *McKenzie v. United States*, 75 U.S. App. D.C. 270, 126 F.2d 533. In that case the Court noted that there was a need for special instructions when a key issue of identification was presented. Thereafter in *Gregory v. United States*, 369 F.2d 185 (D.C. Cir. 1966) the Court held the trial judge's instructions to the jury were deficient:

> "In spite of the fact that the only real issue presented by the evidence was the identification of the defendant, no charge on identification was given. As to both robberies, there was a division among the eyewitnesses as to whether or not the defendant on trial was the bandit. *Yet the jury's attention was not focused on the fact that it not only had to find beyond a reasonable doubt that the crimes had been committed as charged before the defendant could be convicted, but also that beyond a reasonable doubt it was the defendant on trial who had committed them.*" (Emphasis supplied.) *Gregory, supra* at 190.

In *United States v. Levi*, 405 F.2d 380 (Cir. 4, 1968) a bank robbery case, the trial evidence clearly established that the crime had been committed. The primary issue was

identification and the Court there adopted the reasoning of the District of Columbia Circuit as enunciated at that time in *Jones v. United States*, 124 U.S. App. D.C. 83, 361 F.2d 537. The Fourth Circuit affirmed Levi's conviction only after noting that the trial judge did adequately focus the attention of the jury upon the identification issue in the case.

In addition to the Fourth and D.C. Circuits, the Third Circuit has recommended the use of a cautionary charge in eyewitness cases. *United States v. Barber*, 442 F.2d 517 (3 Cir. 1971). It is true the *Barber* case holding was to be applied prospectively. But note, too, that in *Barber*, unlike the case at bar, the Court did charge on identification generally, thus focusing the attention of the jury upon the issue in the case. *Barber*, *supra* at 525. *Barber* also held that in cases in which the witness had ample time to observe, is positive of his identification and is unshaken on cross-examination, then a cautionary charge would not be mandatory. It is submitted that under the *Barber* holding, the case at bar, had it been a Third Circuit case, would have required a cautionary charge, and not merely an instruction which alerted the jury to the issue of the case.

The evolution noted earlier became complete when the District of Columbia Court of Appeals decided *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972). In *Telfaire*, a robbery case, the victim-witness spent considerable time with the defendant before and during the robbery. [7] The trial Court did not give a special

7. The opinion does not specify the amount of time but does state that the witness met the defendant in front of a hotel, conversed with him and accompanied him to the third floor of the hotel where further conversation ensued.

cautionary identification charge. The Court of Appeals affirmed, stating, inter alia,

> "In this case, as in *Macklin*, we consider the instructions given by the trial judge — both the initial instructions on the burden of proving beyond a reasonable doubt all the elements of the offense, and the follow-on instructions dealing with the defense of alibi, and the problem context of the case and *we are satisfied that the attention of the jury was significantly focused on the issue of identity.*" *Telfaire, supra* at 556. (Emphasis supplied.)

Furthermore, the Court said that the facts in that case did not offer the special difficulties often present in identification cases, which would require that additional information be given to the jury in order to enable the Court to

> "repose confidence in (the jury's) ability to evaluate the reliability of the identification." *Telfaire* at 556.

The model instructions set forth in the Appendix to *Telfaire*, while not deemed by the Circuit Court to be mandatory, are not to be ignored absent strong reasons.

Finally, the Court added a further refinement to the doctrine first enunciated in *McKenzie, supra*, in 1942. In *Telfaire, supra*, at 555, footnote 11, the Court stated that identification instructions should be included as a matter of routine and that in cases in which identification is a

main issue, the judge should not rely on defense counsel to request such a charge.

The Court of Appeals for the Second Circuit while giving express recognition to the dangers inherent in eyewitness identification cases has declined to rule that a charge on identification, even one which is limited to focusing the attention of the jury on the issue, is required.

It is respectfully submitted that this Court should rule on the applicability of *Telfaire*, *supra*, and *Barber*, *supra* to the instant case, and determine whether in the light of the reasoned holdings of the aforesaid cases, the petitioner has been denied his right to a fair trial by virtue of the refusal of the Second Circuit to adopt the rationale there presented.

CONCLUSION

For the above reasons this Court should issue a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX A - ORDER OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

For The

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of March one thousand nine hundred and seventy-four.

Present:

HON. LEONARD P. MOORE

HON. WALTER R. MANSFIELD

HON. JAMES L. OAKES

Circuit Judges,

United States of America,	73-2197
	73-2558
Plaintiff-Appellee,	73-2639
v.	
Jose Ancisar Pineda-Marin,	73-2158
Hugo Suarez, Moises Banguera,	73-2159
Ernesto Santo Gonzalez,	73-2319
	73-2647
Defendants-Appellants.	73-2650

Appendix A - Order of the Court of Appeals

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the orders and judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk

By VINCENT A. CARLIN,
Chief Deputy Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1496

ERNESTO SANTO GONZALEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that it was reversible error for the trial judge to fail to charge, *sua sponte*, on identification.

1. After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on three counts of knowing and intentional importation and possession of marijuana, and conspiracy to commit those offenses, in violation of 18 U.S.C. 2, and 21 U.S.C. 841(a)(1), 846, 952(a), 960(a)(1) and 963. He was sentenced to five years' imprisonment and a five year special parole term.[1] The court of appeals affirmed (Pet. App.).

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[1]Also convicted with petitioner were Hugo Suarez, Jose Ancisar Pineda-Marin, Erasmus Flecha, and Moises Banguera. Suarez and Pineda-Marin were sentenced to four years' imprisonment and a three year special parole term, Flecha to four years' imprisonment and a two year special parole term, and Banguera, who was convicted on only on count, to two years' imprisonment and a ten year special parole term. This Court denied Suarez's petition for a writ of certiorari, No. 73-6509, on June 17, 1974.

At approximately 11:30 a.m. on March 25, 1973, the *Francisco Miguel*, a freighter of Colombian registry, arrived in New York and tied up at the State Pier, in Brooklyn (Tr. 166).[2] That evening, at approximately 9:00, customs agents, acting under the direction of Special Agent John Greico, placed the vessel under surveillance from eight observation posts surrounding the ship (Tr. 166-169). This surveillance was predicated upon information received from the Galveston, Texas, office of the United States Customs Service to the effect that this vessel was suspected of being used to transport narcotics to this country (Tr. 44, 50).

Agent Greico, who was situated in an office overlooking the stern of the vessel, observed Suarez and Pineda-Marin, both crewmen, in conversation on the deck of the ship between the hours of 10:00 p.m. and midnight (Tr. 172). Special Agent Robert Graham, who joined Greico in the office observation post at about midnight, observed Flecha on the deck (Tr. 304-305). Graham observed Flecha, Pineda-Marin, and Suarez conversing together on at least four occasions between midnight and 1:50 a.m. (Tr. 304-305).[3] On one occasion, all three entered a hatchway at the rear of the ship (Tr. 305). At trial it was brought out that Suarez was the deck watchman on the ship between midnight and 4:00 a.m. (Tr. 396).

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[2]"Tr." designates the transcript of the suppression hearing and the trial, a copy of which is being lodged with the Clerk of this Court.

[3]Flecha and Suarez were also observed conversing on the deck near the gangplank, on the port side of the vessel, by Special Agent Eugene Weinschenk (Tr. 331).

At approximately 1:50 a.m., Agents Graham and Greico observed four men emerge from the rear hatchway of the ship, which Flecha, Pineda-Marin and Suarez had earlier been observed entering. The men dragged four large bales from the hatchway to a point amidship on the starboard side of the vessel, which was the side away from the pier (Tr. 175-176, 306). Agent Graham identified Pineda-Marin and Flecha as two of the four men dragging the bales; Greico identified petitioner, Flecha and Pineda-Marin (Tr. 174-176, 306). Graham and Greico shared a pair of field glasses at this observation post, which was approximately 50 feet from the stern of the ship, and each used the binoculars for his observation (Tr. 173, 306). It had been raining continuously since midnight (Tr. 177).

The area to which the men carried the bales on the starboard side of the ship was not lit, unlike the identical area on the port, or land, side of the vessel, which was illuminated (Tr. 191). At approximately 1:55 a.m., five minutes after petitioner, Flecha, Pineda-Marin and the fourth, unidentified individual had been observed taking the bales onto the deck, Special Agent Henry Maurer, who had been assigned to another observation post situated on a tugboat near the ship (Tr. 350), observed six men enter the pier area through a hole in the fence and hasten to the vicinity of a grain elevator building near the bow of the ship (Tr. 351). After observing this occurrence, Agent Maurer lost sight of these men (Tr. 352).

At approximately 2:00 a.m., Special Agent Eugene Weinschenk, who was at an observation post inside the grain elevator building, near the bow of the ship, observed two men run in a crouched position out onto a pier past the bow of the ship. Once past the bow of the ship,

one of the men grabbed a wire hanging from a piling and slid into the water. The other man, later identified as co-defendant Banguera, remained crouching at the piling (Tr. 327, 328). The man who went into the water swam toward the bow of the ship (Tr. 331).

This information was communicated to Agent Greico via radio, and the decision was made to close in (Tr. 329). Petitioner, Suarez, Pineda-Marin, and Flecha were apprehended aboard the ship. Banguera was arrested on the pier where he had remained crouching against the piling (Tr. 360, 361-364).

Special Agent Victor Cabrera was one of the first agents to board the ship. He and Agent Muniz ran up the gangplank on the port side of the vessel, where they found Suarez and Pineda-Marin (Tr. 361). While Muniz remained with these men, Cabrera ran through a passageway to the starboard side of the ship (Tr. 361). There he spotted two individuals, later identified as petitioner and Flecha, running from the middle of the ship toward the stern. The agent announced his identity and ordered them to stop, but they continued running. Cabrera fell on the wet deck, and his gun went off. At this point petitioner stopped, but Flecha continued running and went down the rear hatchway of the ship. He was apprehended at the entrance to the crew's quarters below deck (Tr. 361-364).

After the five defendants had been rounded up, petitioner was overheard saying to Flecha, in Spanish, "Why so much excitement? If we are caught, we are caught" (Tr. 365-366).

Subsequent to the arrest, four bales covered with oil-soaked burlap were discovered at the place on the ship

where Agents Greico and Graham had earlier seen the four men dragging the bales (Tr. 174). These bales contained a total of 287 pounds of marijuana (Tr. 88, 302).

At trial, Manuel Restrepo, Captain of the *Francisco Miguel,* testified as a government witness. He testified that Pineda-Marin and Suarez were crew members, but petitioner and Flecha were not (Tr. 398).

2. Petitioner contends that in the circumstances of this case the judge should have charged the jury *sua sponte* on the issue of identification.[4] To support his contention, petitioner cites decisions in the District of Columbia, Third, and Fourth Circuits. These cases are inapposite. In *Jones* v. *United States,* 361 F. 2d 537, 542 (C.A.D.C.), where the defendant impeached the credibility of the government's only identification witness, the court of appeals held:

---

[4]The trial judge charged the jury as follows (Tr. 589-591):

> The Government must show beyond a reasonable doubt that the conspiracy was knowingly formed and that the defendant wilfully participated in the unlawful crime with the intent to advance or further some object or purpose of the conspiracy. That agreement may be inferred from the circumstances and conduct of the parties, since ordinarily a conspiracy is characterized by secrecy and they do not enter into it openly. Nevertheless, suspicion alone cannot be a substitute for evidence.
>
> * * * * *
>
> A difficult part of your job is to evaluate the credibility of the witnesses you heard. You can consider the relationship of the witness to the Government, his bias or his interest in the outcome of the case, his manner while he was testifying, he [sic] candor, his intelligence as you observed it and the extent to which he has been corroborated by other evidence.
>
> * * * * *

> When the defendant has placed the prosecutor's identification of him in issue, either by his own direct denial, by the production of alibi witnesses, or by impeachment of opposing witnesses, *and when the defendant asks for a special instruction on the issue of identification,* the district court should frame an instruction adapted to the evidence in the particular case. [Emphasis added.]

The court in *Jones,* however, rejected the defendant's suggestion that even without request such an instruction was automatically required *(id.* at 541) and upheld the defendant's conviction, stating *(id.* at 542) that "there is no claim whatsoever that the complaining witness' identification of the defendant was in any way complicated or discredited by any related experience as the victim of a crime of violence." This observation is equally applicable to Agent Greico's identification of petitioner.[5] Petitioner had ample opportunity to cross-examine Greico as to the basis for his identification, and he at no time requested an identification charge or objected to the judge's charge (Pet. 11).

The Fourth Circuit's approval of the District of Columbia Circuit rule in *United States* v. *Levi,* 405 F. 2d 380, 382-383, and the Third Circuit's consideration of the identification charge in *United States* v. *Barber,* 442 F. 2d 517, 525-526, arose in the context of a request for such an identification instruction by the defendant. This case,

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[5]As described above, petitioner's attempted flight and his statement "If we are caught, we are caught" corroborated, rather than discredited, Greico's identification of him.

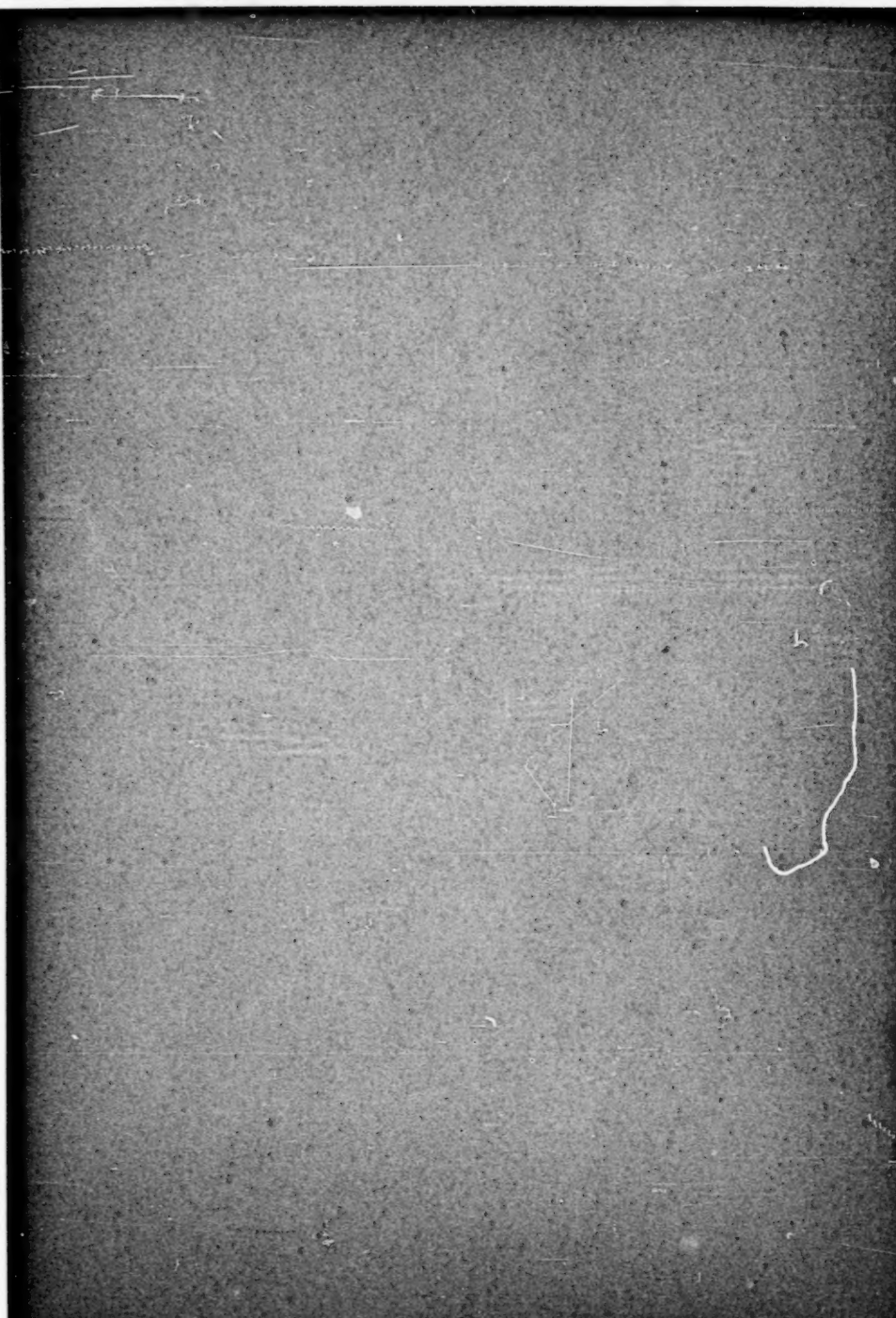
therefore, does not create conflict among the circuits. See also *McGee* v. *United States*, 402 F. 2d 434, 436 (C.A. 10), certiorari denied, 394 U.S. 908; *United States* v. *Telfaire*, 469 F. 2d 552, 556-557 (C.A.D.C.); *Gregory* v. *United States*, 369 F. 2d 185, 190-191 (C.A.D.C.).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1974.

DOJ-1974-08



In The

SEP 14 1974

MICHAEL RODAK, JR., CLE

Supreme Court of the United States

October Term, 1973

No. 73-1496

ERNESTO SANTO GONZALEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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REASONS FOR THE SUPPLEMENT TO THE PETITION FOR A WRIT OF CERTIORARI

After the filing of the petition for a writ of certiorari herein, the United States Court of Appeals for the Fourth Circuit, decided *United States v. Holley,* slip opinion, No. 73-2299, decided May 20, 1974. That case presented an eyewitness identification issue and, as in the case at bar, only one witness identified the accused as the criminal actor notwithstanding the fact that at least one other witness had the same opportunity to

make an identification but was unable to do so. Defense counsel in *Holley* did not request the trial judge to charge the jury with respect to eyewitness identification.[1] The Fourth Circuit unanimously vacated and remanded with directions that at the retrial the defendant "be accorded the benefit of the *Telfaire* instruction." *Holley, supra,* slip op. page 11.

APPLICATION OF UNITED STATES v. HOLLEY TO THE CASE AT BAR

The *Holley* case has particular relevance to the case at bar in terms of furthering the evolutionary process relating to eyewitness identification instructions referred to at pages 15-18 of Gonzalez' petition for a writ of certiorari. In *Holley* reference is made to *United States v. Levi,* 405 F.2d 380 (4th Cir. 1968) which contained instructions to district judges in the Fourth Circuit setting forth standards and factors to be considered before sending an eyewitness identification case to the jury. Speaking for the Court in *Holley,* Judge Craven noted that the District of Columbia Circuit in *United States v. Telfaire,* 469 F.2d 552 (D.C. Cir. 1972) approved the instructions to the district judges as set forth in *Levi* and extended them by requiring that the instructions be given by the trial judge to the jury. *United States v. Holley,* slip op. page 6. As to this practice Judge Craven stated:

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1. The opinion in *Holley* is silent on this point and the writer makes the above representation based upon communications personally had with Charles W. Hawks, Jr., Esq. who served as counsel for Holley at trial and on appeal. Mr. Hawks, at my request has supplied me with a letter, a copy of which is annexed to this supplemental petition and marked Exhibit I. The letter lends support to the assertion herein made.

> "We agree that to guard against misidentification and the conviction of the innocent it is not enough that the trial judge himself be specifically alerted to the detailed factors that enter into the totality of the circumstances, but that the jury should also be so charged." *United States v. Holley,* slip opinion page 6.

In view of the statement in *Telfaire* that the trial judge should not rely upon counsel to request an identification instruction, (*Telfaire,* 469 F.2d 555 n.5), but that such instructions should be routinely given, and the action taken in *Holley* by the Fourth Circuit in the absence of a request to charge it may now be said that the Fourth Circuit requires that in a proper case a sua sponte charge on eyewitness identification be given.

Accordingly, the conflict as between the Third, Fourth and District of Columbia Circuits on the one side and the Second Circuit on the other, is more sharply delineated and, it is respectfully submitted, that review of petitioner's case is now even more appropriate.

CONCLUSION

For the above reasons this Court should issue a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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EXHIBIT I — LETTER OF SEPTEMBER 3, 1974

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September 3, 1974

Mr. Lawrence F. Spirn, Esq.
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RE: U. S. vs. Albert Holley

Dear Mr. Spirn:

In response to your recent inquiry concerning the original trial of Albert Holley which resulted in a reversal by the Fourth Circuit, please be advised that no request was made by trial counsel for the trial court to charge the jury in accordance with the rule of *United States v. Telfaire,* 469 F.2d 552 (d.c. cir. 1972). The trial court did however charge the jury with what was then the accepted identification charge in the Eastern District of Virginia.

Exhibit 1

Upon appeal of the conviction rendered in the District Court, no specific reference was made to the trial courts failure to charge the jury in accordance with the Telfaire rule.

Very truly yours,

s/ Charles W. Hawks, Jr.
Charles W. Hawks, Jr.

CWH,JR/vjl